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IN THE
SUPREME COURT OF THE STATE OF DELAWARE

MARTIN MARIETTA MATERIALS, INC.,

PLAINTIFF AND COUNTERCLAIM-DEFENDANT BELOW, APPELLANT,

V.

VULCAN MATERIALS COMPANY,

DEFENDANT AND COUNTERCLAIM-PLAINTIFF BELOW, APPELLEE.

NO. 254, 2012

APPEAL FROM THE MEMORANDUM OPINION DATED MAY 4, 2012, AND FINAL ORDER AND JUDGMENT DATED MAY 14, 2012 OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 7102-CS

PLAINTIFF AND COUNTERCLAIM-DEFENDANT BELOW APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

On December 12, 2011, Martin Marietta commenced an offer to purchase Vulcan's shares (the "Exchange Offer") and, upon its completion, to consummate a second-step merger between a wholly-owned subsidiary of Martin Marietta and Vulcan whereby Vulcan's shareholders would own approximately 58% of the combined company. The Exchange Offer was conditioned on Vulcan entering into a merger agreement with Martin Marietta. Martin Marietta also announced that it intended to nominate independent candidates for election to Vulcan's staggered board of directors, to replace the directors whose terms expire at Vulcan's 2012 annual meeting. Before the decision below, Martin Marietta had been soliciting proxies in support of its nominees for Vulcan's annual meeting on June 1, 2012.

Also on December 12, 2011, Martin Marietta commenced the action below, which sought to enforce the exclusive Delaware forum provision in the parties' nondisclosure agreement (the "NDA"), and sought a declaratory judgment that the NDA does not prohibit (i) the Exchange Offer or (ii) Martin Marietta's nomination of directors. Thereafter, Vulcan filed its Answer and Counterclaims, alleging that Martin Marietta had breached the NDA and another agreement (the "JDA") and seeking an order enjoining the Exchange Offer. Vulcan also filed an action in the Northern District of Alabama.

On February 28, 2012 through March 2, 2012, the Court of Chancery held an expedited trial. On April 9, 2012, the Court of Chancery heard post-trial oral argument on Vulcan's motion for an injunction. On May 4, 2012, the Court of Chancery issued an opinion and on May 14, 2012, it entered a final order and judgment. Pursuant to that injunction, which the trial court declined to stay, Martin Marietta was required to terminate its Exchange Offer and proxy solicitation. Through this appeal, Martin Marietta seeks the ability to resume these time- and market-sensitive efforts.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in looking beyond the plain, unambiguous language of the relevant contracts, which permits (a) the use of confidential information to evaluate a possible business combination between the parties – without the myriad limiting terms added by the trial court – and (b) the disclosure of the parties' discussions and negotiating positions, and other facts with respect to a permitted transaction, as legally required. The agreements convey only one reasonable meaning, and the trial court erred in examining extrinsic evidence in its speculation as to the parties' intent. Left undisturbed, the trial court's precedent would inject manifest uncertainty into contractual relationships and interpretation, even when the contract eschews a provision (here, a standstill) commonly used to address a recurring contingency and explicitly provides that the contract is the only agreement between the parties as to confidentiality.

2. The Court of Chancery erred by violating fundamental principles of contract interpretation. The trial court invented and then added material terms to the agreements to rationalize an interpretation that supported its favored result. Likewise, the trial court's interpretation renders phrases within the contracts meaningless and ignores other language, violating the principle that a contract should be read so that, if possible, all its language is given full effect and no words are redundant or inoperative.

3. The Court of Chancery erred by failing to apply the accepted rule that parties retain freedom to act unless limited by contract, and instead required parties to identify all affirmative actions that may be taken. This approach is contrary to Delaware public policy, unworkable as a practical matter, and would foment commercial disputes and inflate transaction costs.

4. The Court of Chancery erred by adopting a view of what is "legally required" disclosure under the federal securities laws that runs counter to decades of settled precedent and public policy, as applied by the courts and the Securities and Exchange Commission, and ill serves investors as it endorses a minimalist "what can we get away with" approach to disclosure obligations.

5. The Court of Chancery erred in imposing an injunction without any evidence that its issuance would prevent threatened irreparable harm.

STATEMENT OF FACTS

A. Martin Marietta And Vulcan Execute Confidentiality Agreements That Everyone Agrees Do Not Contain A Standstill.

After earlier business combination discussions dating back to 2002, in April 2010 Martin Marietta and Vulcan once again began discussing a combination of the two companies. (A4-5; A127; A332-33) The parties addressed a business combination in broad terms, with no term sheet. Vulcan's CEO, Don James, conceded that he and Martin Marietta's CEO, Ward Nye, did not agree on any meaningful parameters of a business combination: structure, exchange ratio, control premium (if any), board composition, break-up fees, headquarters, or management. (A21-22; A197-98) Both well understood that one party might propose a transaction to the other for board consideration. (A22)

To facilitate discussions, the parties executed the NDA on May 3, 2010. The NDA was "negotiated" via brief e-mail exchanges over the course of two days between the parties' general counsels. (A190-92) Martin Marietta's General Counsel, Roselyn Bar, marked up a recent agreement between the parties reached in connection with an earlier asset swap necessitated by antitrust divestitures Vulcan made in acquiring another aggregates business – Florida Rock. (A785; A190-91) Bar's changes to the precedent agreement largely reflected the different nature of the two transactions. Vulcan commented substantively only on the choice of law and venue. (A798-802; A191-92)

The NDA permits either party to use the other's confidential information to evaluate a business combination between the parties. Paragraph 2 of the NDA provides that each party may use the other's Evaluation Material (as defined in the NDA) "solely for the purpose of evaluating a Transaction." (A749-50) The NDA defines a Transaction as "a possible business combination transaction ('Transaction') between [Martin Marietta] and [Vulcan]." (*Id.*) As of May 3, 2012, the NDA expired and the parties were free to use any information received under it "without restriction." (A45; A750-51 ¶ 5)

It is undisputed that the NDA does not contain a standstill – a common provision by which one or both parties agrees not to take action to acquire the other. (Op. at 7) In May 2010, Vulcan was seen as a "natural acquirer" of Martin Marietta (Op. at 35), yet Martin Marietta did not request a standstill. (A23; A192; A199) Neither party brought it up. (A23; A130-31; A192; A200) Vulcan and Martin Marietta never discussed and the NDA does not provide any restrictions on the right to acquire each other's securities. (A23) Nor does the NDA prohibit unsolicited proposals or offers to acquire securities of the other party (A24; A199), or proposals to combine the companies subject to board

approval (A199), or the solicitation of proxies for director elections (A21; A23; A199), or seeking representation on the other party's board of directors. (A23) All of these are provisions typically considered for inclusion in standstills. (*See, e.g.*, A1196-97)

The absence of a standstill was not due to Vulcan's ignorance or oversight. Only two weeks before executing the NDA, Vulcan's CEO signed a confidentiality agreement with another party that contained an eighteen-month standstill prohibiting, among other things, "any . . . exchange offer . . . involving the other party," "any 'solicitation' of 'proxies' . . . to vote any voting securities of the other party," and "any action that could reasonably be expected to result in a request to disclose Transaction Information or any of the information contained in the Evaluation Material by a court of competent jurisdiction or by a government body." (A772-73; A22-23)

Among other changes to the Florida Rock asset swap precedent, the NDA was updated to reflect that it did not merely govern any "possible transaction," but was meant to govern a "possible business combination transaction." (A778) Because this was not a situation like the precedent (which involved three parties, where Martin Marietta was swapping assets to allow Vulcan to acquire Florida Rock), Bar changed the language of the Florida Rock NDA from a transaction "involving" Martin Marietta and Vulcan, to a transaction "between" Martin Marietta and Vulcan. (*Id.*)

Instead of recognizing the language tweaks necessitated by the fundamental differences between a non-disclosure agreement for an antitrust-driven asset swap and a non-disclosure agreement for a potential business combination, the trial court speculated, on the basis of the changed language alone, that Bar's change of "involving" to "between" was done "to require joint agreement" in any Transaction. (Op. at 16-17) Likewise without record support, the trial court presumed that Bar would be familiar with a 2009 decision of an Ontario trial court interpreting a distinguishable agreement. (Op. at 83-84) Of course, if Bar did have the intent attributed to her by the trial court (an intent which the trial court concluded was shared), she would simply have added "friendly" or "negotiated" to the definition of Transaction with no resistance from Vulcan, rather than gambling that a court would import comparable meaning to the word "between."

Two separate paragraphs of the NDA address the circumstances where a party can make legally required disclosures. Paragraph 3 of the NDA provides that the parties' discussions are to be kept confidential other than as legally required:

> Subject to paragraph (4), each party agrees that, without the prior written consent of the other party, it and its Representatives will not disclose to any other person, ***other than as legally required,*** the fact that any Evaluation Material has been made available hereunder, that discussions or negotiations have or are taking place concerning a Transaction or any of the terms, conditions or other facts with respect thereto (including the status thereof or that this letter agreement exists).

(A750) (emphasis added) Separately, Paragraph 4 addresses a subset of disclosure requirements (involving external process). As to that subset, Paragraph 4 establishes what the trial court described as the Notice and Vetting Process. (Op. at 6)

Two provisions of the NDA emphasize that the parties' agreement was contained in the NDA and that neither was creating any legal obligations to the other, except as set forth in the NDA. Paragraph 7 provides: "[N]either party will be under any legal obligation of any kind whatsoever with respect to a Transaction by virtue of this or any written or oral expression with respect to such a Transaction by it or its Representatives, except for the matters specifically agreed to in this letter agreement." (A751) And Paragraph 8 of the NDA specifies that it contains the entire agreement between the parties concerning the confidentiality of information exchanged under the agreement. (A751-52)

On May 26, 2010, the parties and their outside antitrust counsel entered into a joint defense agreement (the "JDA," and with the NDA, the "Agreements"), which was drafted by Vulcan's outside counsel. (A93; A103; A755) The JDA does not contain a standstill (A755; Op. at 7), and specifically provides that it does not affect rights and obligations of the parties under the NDA. (A758-59 ¶¶ 12, 15)

B. Talks Break Down And Martin Marietta Examines Its Options.

Vulcan advanced and the trial court accepted a narrative in which Martin Marietta learned from its discussions with Vulcan that synergies from a business combination would likely be greater than Martin Marietta had initially anticipated. (*See generally* Op. at 20-40) Martin Marietta disputes that finding, but this Court need not resolve the factual dispute to conclude that the trial court committed reversible error.[1] As explained herein, the plain language of the

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1 Although the trial court acknowledged that Martin Marietta took a less formalistic approach to synergy calculation than Vulcan and had been

(cont'd)

Agreements permitted Martin Marietta to use confidential information to evaluate a potential business combination transaction between itself and Vulcan. Nonetheless, without regard to whether Martin Marietta "used" Vulcan data, it is clear that by late spring 2011, combination discussions were going nowhere.

C. Martin Marietta Launches An Exchange Offer Conditioned On A Negotiated Merger Agreement.

On December 12, 2011, Martin Marietta announced the proposed business combination, to be accomplished through the Exchange Offer, but conditioned on Vulcan board approval. (A814) Martin Marietta also said that it intended to nominate candidates for election to Vulcan's staggered board, to serve as independent members of Vulcan's Board as they consider the proposed business combination. (A1094)

For Martin Marietta to pursue the Exchange Offer, it was required to file a Registration Statement on Form S-4 (including a prospectus/offer to exchange) and a tender offer statement on Schedule TO, disclosing all facts material to a Vulcan shareholder's decision whether to tender, plus a range of information identified in Securities and Exchange Commission ("SEC") rules. Among other things, SEC rules required Martin Marietta to provide in its Form S-4 a complete description of the background leading to the Exchange Offer. *See* 17 C.F.R. § 229.1005(b); Item 6 to Form S-4. Because the NDA and the JDA permit disclosures that are "legally required" or "required by law," Martin Marietta disclosed aspects of the parties' prior discussions that were subject to Paragraph 3 of the NDA. Contrary to the Court of Chancery's unsupported statement that Martin Marietta disclosed "all the information that it had adamantly insisted be kept confidential" (Op. at 1), Martin Marietta did not disclose competitively sensitive information about Vulcan's operations – it did not disclose any information that was not a material fact pertaining to the transaction, and the trial court did not find that Martin Marietta used any competitively sensitive information about Vulcan to gain a marketplace advantage over Vulcan.

By written instructions issued in response to Martin Marietta's initial filings, the SEC required Martin Marietta to disclose more information in the "Background and Reasons for the Offer" section about, for example, the parties'

(cont'd from previous page)

successful "Martinizing" prior acquisitions (Op. at 11-12, 27-28, 38), it inexplicably discounted the testimony of Martin Marietta's entrepreneurial Chairman, who explained how he readily was able to estimate synergies in a Vulcan-Martin Marietta combination. (Op. at 28-29 n.58; *see* A334-35)

discussions regarding "value creation," synergies, governance, divestitures, and any "quantitative and qualitative" information considered regarding the strategic benefits or structure of the proposed business combination. (A1230-31) After Martin Marietta disclosed additional information, the SEC asked again, seeking even more information about the parties' prior discussions. (A1242)

After Martin Marietta filed its Form S-4, its executives participated in presentations. These presentations did not contain any information about discussions with Vulcan that was not included in the Form S-4. (A1059; A1105) There was nothing new "disclosed" in those presentations.

D. Vulcan Has Suffered No Harm.

Vulcan offered no evidence that it has suffered or is threatened with any cognizable harm – indeed, James conceded that Vulcan has not lost a single customer. (A16) No witness testified (and Vulcan does not claim) that Martin Marietta used confidential Vulcan information to gain a competitive advantage over Vulcan in the marketplace. Nor is there any evidence that Vulcan will suffer any harm from a proxy contest for a minority of Vulcan's board at the behest of an expression of will by Vulcan's shareholders.[2] Likewise, no Vulcan witness purported to explain how Vulcan could be harmed by an exchange offer that is expressly conditioned on its board's approval of a merger agreement.

Although the trial court surmised that "Vulcan is now suffering from exactly the same kind of harm Nye demanded the Confidentiality Agreements shield Martin Marietta from" (Op. at 134), that false (and for purposes of this appeal, irrelevant) assumption ignores the undisputed fact that Nye had no role in negotiating the NDA or the JDA, and never expressed any concern about an unsolicited bid from Vulcan (as opposed to interlopers attempting to disrupt a Vulcan-Martin Marietta combination).[3]

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[2] Martin Marietta owns only 1,000 out of more than 129 million Vulcan shares.

[3] Without any supporting testimony, the trial court stated that Nye "evinced a willingness to forego a 20% premium for Martin Marietta stockholders in the exchange ratio to ensure he was slotted as CEO right away." (Op. at 38) There is no evidence that Vulcan ever made a 20% premium offer, but the record does show that Nye wanted a premium for Martin Marietta and was willing to consider James as interim CEO. (A803; *see also* A9; A12-13) In contrast, James was adamant that Martin Marietta receive no premium. (A9) In addition, Nye wanted to be CEO so that he could "Martinize" Vulcan and extract more value for shareholders. (Op. at 11-12)

ARGUMENT

I. THE TRIAL COURT ERRED IN GOING BEYOND THE PLAIN LANGUAGE OF THE NDA.

The Court of Chancery erred in holding that once Martin Marietta's views on the merits of a business combination with Vulcan were affected by Vulcan's confidential information, Martin Marietta was no longer permitted to make an unsolicited acquisition proposal or exchange offer, or to nominate directors to Vulcan's board.

A. QUESTION PRESENTED

Did the Court of Chancery err in substituting its views of the parties' intent for the plain meaning of the relevant contracts?

B. SCOPE OF REVIEW

"A judicial interpretation of a contract presents a question of law that this Court reviews *de novo.*" *Alta Berkeley VI C.V. v. Omneon, Inc.*, -- A.3d --, 2012 WL 694762, at *3 (Del. Mar. 5, 2012).

C. MERITS OF ARGUMENT

In interpreting a contract, the ordinary and usual meaning of the chosen words establishes the parties' intent, and "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). "[A] party will be bound by its plain meaning because *creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.*" *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) (emphasis added). *See also O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) ("[This Court has] held unequivocally that '[e]xtrinsic evidence is not to be used to interpret contract language where that language is 'plain and clear on its face.'") (quoting *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997)).

Moreover, a "contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc*, 616 A.2d at 1196. "[T]he true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Id.*; *see also O'Brien*, 785 A.2d at 288.

When interpreting a contract, "Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity." *O'Brien*, 785 A.2d at 289. *See also BLGH Holdings LLC v. enXco LFG Holding, LLC*, -- A.3d --, 2012 WL 1022140, at *3 (Del. Mar. 27, 2012). Here, the Court of Chancery committed reversible legal error by departing from the plain meaning of the contracts in question and contorting that plain meaning by substituting what it believed the parties "really" intended.

1. The Court of Chancery erred in adding limiting terms to the broad phrase "business combination."

The NDA permitted Martin Marietta to use information provided by Vulcan to evaluate a "possible business combination between [Vulcan] and [Martin Marietta]," and the transaction Martin Marietta has proposed is just that. The Court of Chancery erred by holding that the combination proposed by Martin Marietta between itself and Vulcan is not a "business combination transaction between" Martin Marietta and Vulcan.

The Court of Chancery ultimately concluded that a "business combination transaction between" Vulcan and Martin Marietta "means any step or related series of steps leading to a formal mingling of the two companies' assets *that is contractually agreed upon, or consented to, by the sitting boards of both companies at the outset of those steps being taken*." (Op. at 88 (emphasis added)) The trial court reached this conclusion by effectively drafting a new agreement with the italicized language judicially added. The Agreements easily could have been drafted with these exact words (but were not) or the parties easily could have accomplished the same goal with the inclusion of a standard standstill provision (but did not). The words actually chosen by the parties in the NDA are broad and general, but that does not render the NDA ambiguous. *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 8 (Del. 2002) ("It is not within our purview to add unilaterally to the terms of an agreement to strengthen its perceived goal."); *Cincinnati SMSA L.P. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) ("Delaware observes the well-established general principle that (absent grounds for reformation which are not present here) *it is not the proper role of a court to rewrite or supply omitted provisions* to a written agreement.") (emphasis added); *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006) ("It is imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain, so courts do not trump the freedom of contract lightly.") (quoting *Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at *7 n.17 (Del. Ch. June 5, 2006)).

(a) The trial court improperly added language to an unambiguous contract.

Ignoring the plain meaning of "business combination," a meaning that even Vulcan uses in its SEC filings and pleadings,[4] the trial court improperly added terms that were not part of the parties' bargain. There is no support in the Agreements' plain meaning to justify the trial court's interpretive leap in adding the contractual requirements that there be an "agreed-upon, or consented to" combination of businesses (Op. at 88), where the words "consensual, negotiated, or agreed upon" do not appear in the Agreements. The trial court found that the word "transaction" might plausibly signify that "there would be an agreement on the how of the combination." (Op. at 71) But the trial court's interpretation of the word "transaction" to require consent in advance by the board's existing directors is contorted. If true, a unilateral tender offer would not be a "transaction," which is refuted by our law and finds no support in common English usage. *See, e.g.*, *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 95 n.312 (Del. Ch. 2011) ("Air Products' tender offer would almost certainly result in a "change of control" *transaction*.") (emphasis added); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 607 (Del. Ch. 2005) ("That is, in the context of going-private *transactions* implemented by tender offers by controlling stockholders – so called *Siliconix transactions*. . . .") (emphasis added). The trial court committed legal error by "tortur[ing] contractual terms to impart ambiguity." *Rhone-Poulenc*, 616 A.2d at 1196.

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[4] *See, e.g.*, A416 ¶ 1 ("Vulcan shared . . . analyses of potential synergies achievable in a potential *combination* . . . ."; A428-29 ¶ 29 ("overlaps posed risk to any *combination*"); A432-33 ¶ 37 ("Synergies are usually a key driver of strategic mergers, because the efficiencies in operations and expenses that arise from the *combination* . . . ."); A433 ¶ 38 ("Without this information, Martin Marietta would have been left to guess about key aspects of Vulcan's business, and as a result would have been unable to undertake meaningful analysis of the potential divestitures, synergies and benefits of a *potential combination*."); A434 ¶ 39 ("For all these reasons, the confidential information shared by Vulcan in the joint effort was highly valuable to Martin Marietta, which could evaluate the benefits of a *combination*."); A439-40 ¶ 49 ("Martin Marietta has sought to buttress the attractiveness of its offer by repeated reference to the synergies it says it expects to receive as a result of *the combination* and its expectation that the antitrust divestitures required in *a combination* will not be significant . . . . The offer thus relies on the exact information that . . . Vulcan provided to Martin Marietta . . . .") (emphasis added).

Neither agreement gave a hint that once the parties exchanged information, either party would be prohibited from pursuing an unsolicited bid. Commonly, when parties intend to achieve that result, they include the oft-used provision in M&A transactions designed precisely to do that – a "standstill provision." *See, e.g., Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.*, 1995 WL 523543, at *3 (Del. Ch. Aug. 11, 1995) ("The practice of requiring a bidder to sign a confidentiality and standstill agreement as a condition to allowing 'due diligence' access to confidential information, is well recognized and accepted."). Vulcan could have incorporated a standstill provision – indeed, it had executed a standstill two weeks earlier, Redacted The absence of any standstill is undisputed and clear from the face of the Agreements, and the Court erred in resorting to extrinsic evidence to imply terms and discern intent to add a standstill that the parties failed to include.

(b) The trial court improperly ignored the actual terms of Martin Marietta's offer.

In all events, Martin Marietta's proposal fits comfortably within even a narrow definition of business combination that requires board approval. As the trial court conceded, Martin Marietta's proposal expressly calls upon Vulcan's board to approve a merger agreement. (Op. at 79-80)

In determining that Martin Marietta had not proposed a business combination that fits its narrow definition, the trial court excised terms of Martin Marietta's proposal – its express condition that the parties enter into a merger agreement. The trial court rationalized that the condition "fails to convince me that [Martin Marietta's] bid falls unambiguously within the contractual requirement that it be a business combination transaction 'between' Vulcan and Martin Marietta" (Op. at 79), because "Martin Marietta has not amended its Exchange Offer to make the condition non-waivable, and I continue to treat it as waivable."[5] (Op. at 80) The only legal reason the trial court proffers for ignoring the express condition is that Chancellor Allen once "refused to accept a party's hedgy and unclear waiver of a condition to a tender offer that the target's board negotiate a merger agreement." (Op. at 80 n.177 (citing *TW Servs., Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *11 (Del. Ch. Mar. 2 1989)).

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[5] To resolve any question, after trial Martin Marietta represented to the trial court in writing that the condition would not be waived. (A747) There is no reason the trial court could not rely on counsel's clear, authorized representation to that effect.

But in *TW Services*, Chancellor Allen acknowledged that "[b]y conditioning the closing of its tender offer upon the execution of a merger agreement, SWT has implicated . . . the board's Section 251 power." *Id.* at *11. Moreover, Chancellor Allen rejected the argument advanced by the trial court here that a hypothetical, future waiver of a condition changed the analysis. The offeror had not waived the condition, and it was precisely "[b]y doing so, [that the offer] continues to call upon the board to act under Section 251." *Id.* Thus, contrary to the trial court's analysis, *TW Services* holds that by conditioning an offer on the target board's approval and by keeping that condition in place, the offer will be treated as calling for the target board to negotiate a merger agreement. That is exactly what Martin Marietta's offer does here, as is further evidenced by Martin Marietta proposing independent Board candidates to consider the proposed business combination. Even Vulcan's CEO admitted that Martin Marietta's proposal requires board approval. (A22) Only by ignoring the express term of the Exchange Offer could the court find that it fell outside the court's narrow and invented definition of a "business combination transaction." Indeed, Vulcan's articulation of what type of transaction *would* qualify never came to rest in the course of the litigation.[6]

The trial court also erred by adding a dead-hand board provision to the NDA. There is no support in the NDA's plain meaning for the trial court's radical holding that the term "business combination transaction between" two companies creates the equivalent of a dead-hand anti-takeover device where only "sitting boards at the outset of those steps being taken" can decide to enter into a business combination. (Op. at 88)

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[6] Op. at 64; A397 ¶ 17 ("negotiated business combination"); A388, 402 ¶¶ 1, 29 ("consensual business combination"); A393 ¶ 9 ("negotiated consensual business combination"); A8 ("negotiated friendly consensual transaction[s]"); A547 ("negotiated, consensual, merger-of-equal type transaction"); A664-65 (a "merger" that must be negotiated *only with the Vulcan board members in office as of May 3, 2010*); A664 ("Court: Okay. So that's different than the answer you gave before. . . . I'm saying that is substantially different than the answer you gave before. . . . I think we went over it a couple of times."). Vulcan's "ever-changing arguments . . . [require] playing a game of 'Whack-a-Mole'" because every time an added term is addressed another pops up in its place. *TR Investors, LLC v. Genger*, 2010 WL 2901704, at *12 (Del. Ch. July 23, 2010), *aff'd*, 26 A.3d 180 (Del. 2011).

Here, the trial court again added terms that do not appear in the NDA. Vulcan certainly knows how to draft a contract providing that only "Continuing Directors" or the like are authorized to enter into an agreement, because its certificate of incorporation contains just such a provision. (Vulcan COI, Art. VIII.C. (defining "Continuing Director" in context of anti-takeover provision)) The trial court appears to have based its creation of an unwritten dead-hand anti-takeover device on an extraordinary and dated worldview: bidders making premium offers who nominate independent, non-management directors are denigrated as "conquerors" who will "cause[] their subjects to sign up terms of peace . . . at pain of death." (Op. at 80) The trial court also analogized Martin Marietta's nomination of a *minority* slate of Vulcan directors to Martin Marietta "murder[ing]" Vulcan's directors to steal the company (Op. at 79), and repeatedly referred to the slate of independent directors as "Vichy" directors. (A658, 661, 664-65) It also invented a temporal requirement (that Vulcan's board first agree before the shareholders are permitted to consider a transaction) when no such concept appears in the NDA. (Op. at 75)

The trial court's worldview demeans the basic right of shareholders to nominate directors and to elect freely the persons the shareholders choose to manage the corporation – a fundamental right without which various anti-takeover devices would be deemed impermissible. *See, e.g.*, Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1054 (2002) ("It was always contemplated that the possibility of a proxy fight to replace the board would result in the board's taking shareholder desires into account. . . . The pill and the proxy contest have proved to yield the perfect balance, both hoped for and intended, between an acquiror and a target.").

2. The Court of Chancery erred in its interpretation of the word "between."

The trial court next reasoned that although the agreements do not use the words "negotiated, consensual or friendly," their absence does not matter because "'negotiated' and 'between' are equivalent terms." (Op. at 76) The trial court ignored the natural and broad definition of "between" found in numerous dictionaries ("linking," "connecting," and "intermediate to"), deciding instead that only one lesser, select definition applied. The trial court reasoned that the standard definition was limited to "spatial relationships" and that "between" conveyed joint action. (*Id.* at 76, 79) That holding conflicts directly with this Court's usage and everyday parlance. *See Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 256 (Del. 1991) (describing "short-form merger *between* ABC and Drummond Holding Corporation") (emphasis added). "In a short-form merger, there is no agreement of merger negotiated by two companies; there is only a unilateral act." *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 247 (Del.

2001) ("The minority stockholders receive no advance notice of the merger; their directors do not consider or approve it; and there is no vote.").

Commentators also would not agree that "negotiated," "friendly," or "solicited" are unnecessary and redundant when contracting parties have used the word "between." *Compare* Igor Kirman, M&A AND PRIVATE EQUITY CONFIDENTIALITY AGREEMENTS 89 (A1211) (2008) (including in example of "Seller-Friendly Confidentiality Agreement" the words "***negotiated*** transaction (the 'Transaction') ***between*** [the parties]") *with id.* at 99 (A1216) (including in example of "Buyer Markup of Seller Draft" the blacklined phrase "~~negotiated~~ transaction (the 'Transaction') ***between*** [the parties") (strikethrough in original and emphasis added). If Vulcan wanted to limit the general term "business combination" to "solicited, private, negotiated, friendly, mergers of equals," it easily could have done so. The trial court committed plain legal error when it added those terms to alter fundamentally the plain meaning of "business combination transaction."

To conjure up ambiguity, the trial court placed great weight on what it characterized as Vulcan's "unique narrowing meaning" of the word "between." (Op. at 76) Indeed, according to the trial court, so long as a word in a contract has more than one dictionary definition, it is sufficiently ambiguous to justify abandoning the contract's four corners. (Op. at 75-76) Never mind that the trial court recognized that "the parties could have used the word 'negotiated' if they meant to provide that Evaluation Material could only be used in furtherance of a negotiated transaction." (Op. at 80) What's more, the trial court's focus on Vulcan's "unique narrowing meaning" of "between" actually implies greater protection in the language of the NDA than even Vulcan's CEO thought was present. (A24) (admitting that the NDA did not contain a provision prohibiting a unilateral proposal to acquire "securities or assets" of Vulcan))

The trial court also erred in relying on the decision of a Canadian trial court, based on Canadian law, involving distinguishable facts, and interpreting English words in a manner counterintuitive to those south of the 49th parallel. (Op. at 75 (citing *Certicom Corp. v. Research in Motion Ltd.*, 94 O.R. 3d 511 (Can. Ont. Sup. Ct. J. 2009))) Unlike the offer in *Certicom*, the offer here is conditioned on Vulcan's board approving a merger agreement (A838), so *Certicom*'s counterintuitive definition of "between" – even if correct – would still support Martin Marietta. (A572 n.6)

Other idiosyncratic facts in *Certicom* also distinguish it. For example, in *Certicom*, one of the confidentiality agreements had defined "business combination" in a way that excluded by implication "a tender, takeover bid or

exchange offer." 94 O.R. 3d 511, ¶ 45. Here, the NDA contains no such limitation. The other confidentiality agreement in *Certicom* permitted use only to assess "a business or contractual relationship between the Parties," and omitted language allowing use to assess "'some form of a business combination between the Parties.'" *Id.* ¶ 24. Here, the NDA permits use to evaluate any "business combination." Also, in *Certicom*, the parties originally agreed to a standstill that had expired, *id.* ¶ 15, while here, Vulcan disclaims a standstill. Moreover, the offer in *Certicom* was all-cash, *id.* ¶ 34, while here the Exchange Offer is an exchange of stock that will result in both businesses being combined under the ownership of the shareholders of both companies.

Dispositively, however, there was absolutely no basis for the trial court to conclude without any evidence that Bar must have had *Certicom* in mind when she inserted "between" into the NDA (Op. at 83-84), or that she would have chosen Delaware as the governing law if she wanted *Certicom* to apply. If Bar had wished to prevent an unsolicited proposal by Vulcan, she simply could have asked for a standstill or inserted the word "negotiated" in the definition of a Transaction. It is irrational to conclude without record support that Bar would try to achieve that invented goal indirectly by using "between," rather than "negotiated," in the hope of falling within an Ontario court's precedent.

3. The trial court erred in implying harm to Vulcan based on its unsupported view of why Martin Marietta entered into the NDA.

The NDA allows the parties to engage in conduct that would be prohibited by a standstill, because it does not prohibit that activity. That should have ended the inquiry. Yet, the trial court ignored the unambiguous terms of the NDA, effectively implying a standstill based on its erroneous finding that "Vulcan is now suffering from exactly the same kind of harm Nye demanded the Confidentiality Agreements shield Martin Marietta from." (Op. at 134) Indeed, virtually all of the trial court's contract analysis, as well as its finding that Vulcan has been harmed, rests on its assumption that "Martin Marietta was not just concerned about unsolicited bids from third parties. It also did not want to be acquired by Vulcan." (Op. at 82)

Because the terms of the NDA are unambiguous, the trial court's speculation about the parties' intent is legally irrelevant. It also finds no support in the record. As Vulcan's CEO, Don James, admitted, "'[Nye] was very concerned that . . . the fact of any discussions we had remained very confidential so that there would not be an opportunity for ***someone to come in . . . and interrupt the transaction*** and make a hostile bid for one or the other of us.'" (Op. at 13 n.15 (quoting Tr. at 21)) (emphasis added) Any CEO pursuing a highly

desirable strategic transaction would want to avoid the risk of intervention – and leaks of discussions would complicate that risk. However, it is a leap of illogic to conclude that this same CEO would give up for two years the option of proceeding on an unsolicited basis if negotiations failed. (That this was not an overriding concern to Nye in any event is confirmed by the fact that Martin Marietta ultimately made a public bid for Vulcan, which raises the same intervention risk as a leak of negotiation.) The speculative nature of the trial court's unsubstantiated conclusion is evident in its statement that "the failure to discuss a standstill *most likely* flowed from both [CEOs'] evident desire for confidentiality and the shared premise that they were seeking to explore whether a friendly, consensual merger could be reached." (Op. at 13, emphasis added)

If Nye were actually concerned about an unsolicited offer from Vulcan, he would have insisted that the parties enter into a standstill agreement. After all, when talks began in early 2010, Vulcan was seen as the "natural acquirer." (Op. at 35) But Nye never did. (A23; A192; A199) In fact, neither party ever brought it up. (A23; A130-31; A192; A200) Nor did Martin Marietta include a provision in the NDA precluding a proxy contest. (A199) And neither party limited the NDA to only a "negotiated" transaction. (*See* Op. at 80) In short, Bar made none of the changes that would have been expected if her intent was to placate a CEO "nervous" about Vulcan. (*See* Op. at 103)

The trial court based its supposition that Martin Marietta meant to preclude a hostile offer by Vulcan on: 1) Nye's notes preparing for an April 2010 conversation with Michael Carr, Vulcan's banker at Goldman Sachs, that stated that Martin Marietta was "not for sale," and 2) Nye's notes for a May 2010 conversation with James that said Nye viewed the transaction as a "modified 'merger of equals.'" (Op. at 15 n.21, 82 nn.181-82, 134 n.285) This is erroneous for several reasons. First, Nye and Carr had nothing to do with the negotiation of the NDA (A131), which was negotiated between Martin Marietta's and Vulcan's General Counsels. (A20; A190-92) (describing entirety of negotiation of NDA between Bar and Vulcan's General Counsel, Robert Wason) Redacted

Redacted

Although Nye was sensibly concerned about the risk that an interloper would disrupt a business combination between Martin Marietta and Vulcan, nothing in the record supports the trial court's speculation that Nye wished to avoid an unsolicited offer from Vulcan. Indeed, the record, including the NDA itself and its drafting history, is entirely to the contrary.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE NDA PROHIBITED THE DISCLOSURE OF MATERIAL FACTS.

The Court of Chancery erred in interpreting the NDA in a way that did not give full effect to all its provisions, and its restricted view of the scope of "legally required" disclosure runs counter to the law and public policy.

A. QUESTION PRESENTED

Did the Court of Chancery err in holding that the NDA did not allow legally required disclosure unless that disclosure was both "balanced" and made only after prior notice to Vulcan?

B. SCOPE OF REVIEW

The relevant provisions are unambiguous and require *de novo* review. *See* Argument I.B *supra.*

C. MERITS OF ARGUMENT

1. The Court of Chancery erred in applying the NDA's prior notice requirement outside the context of external demands for information.

While disclosure of Evaluation Material and Transaction Information was generally barred, the NDA provides an exception to non-disclosure in two distinct scenarios. Paragraph 3 permits disclosure of Transaction Information whenever "legally required." (A750) Paragraph 4 permits disclosure "*[i]n the event that* a party . . . [is] requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or similar process) to disclose any of the other party's Evaluation Material or any of the facts, the disclosure of which is prohibited under paragraph 3 . . . ." (*Id.*) (emphasis added)

Contrary to the trial court's interpretation, Paragraph 4 of the NDA does not define the entire universe of "legally required" disclosures permitted by Paragraph 3. Rather, the NDA permitted the parties to disclose information if "legally required" without resorting to Paragraph 4's notice process, unless the legal requirement was precipitated by an external demand such as a subpoena, interrogatory, or other similar process. Ignoring the unambiguous language of Paragraphs 3 and 4 of the NDA, the trial court incorrectly considered extrinsic evidence and added draconian restrictions on the disclosure of Transaction Information to which the parties clearly did not contract. (Op. at 103)

(a) The Court of Chancery's interpretation creates redundant terms.

If Paragraph 3 of the NDA had the meaning claimed by the trial court, the phrase "other than as legally required" in Paragraph 3 would have no meaning – a result that is in direct contravention of Delaware law. Contrary to the Court of Chancery's assertion that "in contracts, redundancy sometimes adds clarity" (Op. at 102), Delaware courts have consistently held that contracts are to be interpreted in a way that does not render any provision "illusory or meaningless." *O'Brien*, 785 A.2d at 287-88 (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)). *See Axis Reins. Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (rejecting interpretation of agreement that would render many provisions "a nullity"). Nor may a contract be interpreted in a way that would make part of it "mere surplusage." *Kuhn Constr. Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

Notwithstanding the weight of contrary authority, the trial court, relying on *US West, Inc. v. Time Warner Inc.*, 1996 WL 307445 (Del. Ch. June 6, 1996), determined that reading redundancy into the NDA was appropriate. (Op. at 99-100 & n.210, 102) In *US West*, however, the Court of Chancery merely held that so long as a contract "*unavoidabl[y]* must be read to include a certain degree of redundancy," that is how it should be interpreted. 1996 WL 307445, at *15 (emphasis added). Redundancy was unavoidable in *US West* because the parties had been so specific, drafting standstill provisions that prohibited the acquisition of interests in certain entities, subject to particular, scheduled exceptions. *Id.* at *6. Here, by contrast, redundancy is totally unjustified. Paragraph 3's exception is not redundant of Paragraph 4 because it applies to all legally required disclosures, not just disclosures required by external demands.

The words "legally required" may be broad, but they are clear, and do not provide any reason that would justify looking beyond the four corners of the Agreements. Broad contract language is to be read broadly – according to its plain meaning. *Axis Reins. Co.*, 993 A.2d at 1064-65 (contract contained "express, broad language" and "unqualified, broad phrases that unambiguously" explained exceptions to parties' obligations).

Indeed, had the parties intended to apply Paragraph 4's notice provisions to Paragraph 3 disclosures, it was well within the state of the art to draft such an agreement. (A1160-61) All Vulcan had to do was remove the phrase "legally required" from Paragraph 3 to achieve such a purpose. Vulcan simply could have written, "Subject to Paragraph (4), each party agrees that, without the prior written consent of the other party, it and its Representatives will not disclose to any other person [the parties' discussions, negotiations, and exchanges of

information]." (*See* Op. at 103) Vulcan could have expressly provided that the notice provisions applied to all disclosures, or negotiated to exclude disclosure obligations triggered by the parties' own acts. Vulcan *could have* done any number of things to create the very protections that the Court of Chancery read into the NDA – but Vulcan did not. In holding otherwise, the trial court reversed the long-standing presumption that, in the absence of clear contractual provisions limiting conduct, parties to contracts should be able to conduct their legitimate commercial affairs freely.[7]

Thus, the Court of Chancery's interpretation of the NDA rendered meaningless the stand-alone phrase, "other than as legally required," in Paragraph 3. For that reason alone, the Court's conclusion regarding the scope of the "legally required" exception to the NDA's disclosure limitations is in error.

(b) The Court of Chancery's interpretation reads terms out of the NDA.

As discussed, Paragraph 3 of the NDA permits disclosure when "legally required" (A750), and Paragraph 4 permits disclosure "*[i]n the event that* a party . . . [is] requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or similar process) to disclose any of the other party's Evaluation Material or any of the facts, the disclosure of which is prohibited under paragraph 3 . . . ." (*Id.*) (emphasis added) The trial court's interpretation of the contract renders meaningless the phrase "in the event that." (Op. at 108 n.224)

This tortured construction is completely unnecessary because the two paragraphs can be read together harmoniously. *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *13 (Del. Ch. Oct. 11, 2006) ("A court must

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[7] This policy is well-recognized in the law. *See, e.g., Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1033 (Del. Ch. 2006) (holding that contract provisions that "restrict the commercial freedom that [parties] otherwise enjoy under default law are traditionally interpreted strictly, precisely because they involve specifically extracted limitations on ordinary economic liberties"). And, in fact, it was recognized by the Court at post-trial oral argument. (A655) ("I had always thought that, frankly, if there was residual doubt about whether something restricted the commercial freedom . . . we . . . resolve the doubt in favor of freedom of commercial action and particularly when, as you know, there's a very well-recognized tool to use in these circumstances . . . .").

interpret contractual provisions in a manner that would give effect to every term of the instrument and reconcile all provisions of the instrument when read as a whole."). Paragraph 3 provides a general exception to the nondisclosure bar ("other than as legally required"), without regard to the source of the legal requirement. (A750) Paragraph 4 applies only to that subset of information that is "requested or required" by external process (such as third-party requests or demands in legal proceedings or similar proceedings, as set forth in the parenthetical quoted above). (*Id.*) *In such cases*, Paragraph 4, among other things, imposes an obligation to provide notice to the counterparty and an opportunity for the counterparty to seek confidentiality protection. (*Id.*) This division makes particular sense given that the principal disclosure applicable under Paragraph 3 is that which is required by the federal securities laws, discussed *infra*. This division is also logical as it permits all of the text of both Paragraphs 3 and 4 to be given full effect.

(c) The Court of Chancery's interpretation conflates distinct terms.

The trial court incorrectly conflated "legally required" and "requested or required." In the trial court's view, "the only reasonable way to interpret ¶ 3 and ¶ 4 in light of the extrinsic evidence is that the circumstances under which a party is permitted to make 'Required Disclosure[s]' under ¶ 4 are the only circumstances under which a party is allowed to make 'legally required' disclosures under ¶ 3." (Op. at 108) But the trial court's dogged pursuit of one "definition" for the term "required" disregards the surrounding text and ultimately confuses two distinct phrases. (*See* Op. at 96)

Although the trial court held that a parenthetical phrase in Paragraph 4 limited legally required disclosures to those precipitated by an external demand, that parenthetical abuts the phrase "requested or required," not "legally required." (A750) Indeed, "legally required" does not appear in Paragraph 4 until the following sentence: "If, in the absence of a protective order . . . or the receipt of a waiver . . . the party requested or required to make the disclosure . . . should nonetheless, in the opinion of such party's . . . counsel, be legally required to make the disclosure." (*Id.*) Thus, Paragraph 4 provides a disclosure regime where, when asked for information (by an external demand), a party must give notice and, in the absence of a protective order or waiver, obtain advice of counsel as to whether the disclosure is legally required.

If, as the trial court asserts, Bar's intent in adding the "subject to" language to start Paragraph 3 was to make it subservient to Paragraph 4, it would have been far simpler just to delete the phrase "other than as legally required" from Paragraph 3. There is a much more logical explanation for Bar's drafting

change, which is to signal to the reader that Paragraph 3 does not establish the complete disclosure exception and that Paragraph 4 should also be read to determine whether it has application.

In addition, the trial court's misinterpretation of the phrase "requested or required" explains its erroneous finding that the parties were not permitted to take steps that generated legal requirements to disclose information. (Op. at 113-16) If the parenthetical in Paragraph 4 were the sole definition of when "legally required" disclosure is permitted, it effectively would neuter the ability to comply with the federal securities laws. This is because the vast majority of disclosure required by the federal securities laws is not preceded by "oral questions, interrogatories, request for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process" – the predicate imposed by Paragraph 4 for any disclosure. (A750) The obligation is imposed automatically. If a party is free to make an exchange offer, for example, the party *ipso facto* must comply with the applicable disclosure requirements. The trial court's restrictive view of disclosure permitted by the NDA effectively reads in an entirely new provision prohibiting an unsolicited offer. (Op. at 113-16) Thus, the trial court's reading of Paragraphs 3 and 4 effectively would vault them into the role of a stealth standstill. *See Allied Capital*, 910 A.2d at 1035 ("[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.").

(d) The Court of Chancery's interpretation of "subject to" is inconsistent with its own rules.

The Court of Chancery said that "[t]he only reasonable way to read the addition [of '[s]ubject to paragraph (4)'] is that it was making ¶ 4 more powerful than ¶ 3 and subordinating ¶ 3 to ¶ 4." (Op. at 105) This runs contrary to basic principles of contract interpretation. In this context, "subject to" means only that Paragraph 3, which generally prohibits certain disclosures, is limited by Paragraph 4, which provides a process for disclosure in response to certain legal requirements.

The trial court urges an interpretation of "subject to" that is inconsistent with its own rules. For example, Court of Chancery Rule 23(e) provides that, in general, a class action may not be dismissed or compromised without court approval. Rule 23(e) is, of course, "[s]ubject to the provisions of Rule 15(aaa)." Ct. Ch. R. 23(e). If the trial court's interpretation of the NDA were correct, Rule 23(e) would apply only in instances where Rule 15(aaa) also applied. Nevertheless, it is not the case that the Court of Chancery will review settlements only when a defendant has filed a motion to dismiss. Similarly, a plaintiff is not precluded from dismissing an action without prejudice under Rule 23(e) if no

motion to dismiss has been filed. Use of the words "subject to" in Court of Chancery Rule 26(b)(3) similarly demonstrates the trial court's result-oriented illogic.

2. The Court of Chancery's view of what is "legally required" disclosure is inconsistent with precedent and unwise.

According to the trial court, Martin Marietta needed only to disclose "the fact that the parties discussed a merger, that they entered into Confidentiality Agreements, and that they ultimately could not come to terms on the utility of doing a deal." (Op. at 122) But this minimalist view of the disclosure obligations imposed by the federal securities laws is contrary to SEC Rules, established precedent, and public policy, and effectively operates as a backdoor standstill agreement. At a time when some voices have urged the federalization of state corporation law, it does not serve our state well for Delaware law to support the most minimal disclosures imaginable, when the parties expressly contemplated and provided for legally required disclosure.

(a) The Court of Chancery did not identify a single disclosure that was not legally required.

All of Martin Marietta's disclosures were legally required by the federal securities laws.[8] Indeed, as noted above, the SEC demanded additional disclosure upon review. This is because Item 1005(b) of the SEC's Regulation M-A requires disclosure of "*any* negotiations, transactions, or material contacts during the past two years," a period including all negotiations that would have been subject to the Agreements. *See* 17 C.F.R. § 229.1005(b) (emphasis added); *see also* Item 6 to Form S-4 ("*describe any* past, present, or proposed material contracts, arrangements, understandings, relationships, negotiations or transactions") (emphasis added); 17 C.F.R. § 229.1011 (requiring disclosure of

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[8] *See, e.g.*, 17 C.F.R. §§ 229.1006(a), 1006(c)(1), 1011(c) (2011); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); *RP Acquisition Corp. v. Staley Cont'l, Inc.*, 686 F. Supp. 476, 479 (D. Del. 1988); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 448 (Del. Ch. 2002); Acquired Sales Corp., SEC Comment Letter, ¶ 13, 2011 WL 4070378 (Apr. 21, 2011); Vulcan Materials Co., SEC Comment Letter, ¶ 2, 2007 WL 4249981 (May 11, 2007); Verizon Commc'ns Inc., SEC Comment Letter, ¶ 55, 2005 WL 4782824 (May 17, 2005); Exelon Corp., SEC Comment Letter, ¶ 13, 2005 WL 6178648 (Mar. 11, 2005).

applicability of antitrust laws in addition to disclosures required by Item 1005(b)). While the Court of Chancery agreed with Vulcan's assertion that Martin Marietta could have limited its disclosures to a "barebones recitation" (Op. at 122), the SEC requires broad disclosures of similar matters. *See, e.g.*, Microfluidics Int'l Corp. Sched. TO-T, filed Jan. 25, 2011, File No. 005-35850, CIK-723889/SIC-3821, 2011 WL 2213273 (Feb. 2, 2011) (requesting "greater detail [of] all negotiations amongst the parties" relating to terms of relevant agreements); Whirlpool Corp., SEC Comment Letter, 2005 WL 4847046 (Oct. 25, 2005) (requiring disclosure of divestitures made to obtain regulatory approval).

In addition, the trial court failed to address Vulcan's repeated admissions (until the trial court suggested otherwise) that Martin Marietta's disclosures were legally required by the federal securities laws. Until after trial, Vulcan never disputed and often agreed that federal securities laws required Martin Marietta's disclosures. For example, Vulcan claimed that Martin Marietta's disclosures were of information material to shareholders. (A1146) And in other proceedings, Vulcan claimed that Martin Marietta did not disclose *enough* information. (A1293-94 ¶¶ 89-90 (*Vulcan Materials Co. v. Martin Marietta Materials, Inc.*, Case No. No. 2:11-cv-04248-LSC (N.D. Ala. filed Feb. 1, 2012))) And the trial court's position is all the more implausible given that the SEC reviewed Martin Marietta's disclosures and sought more detail. (A1227; A1238; A1241; A1247; A1251)

Importantly, the trial court failed to identify a single disclosure that was not a material fact. In its analysis, the trial court identified only two categories of disclosures – and four total disclosures – that it claimed exceeded a "legal requirement." (Op. at 123-24) However, the trial court found only that "*nothing in the text of the securities rules*" required Martin Marietta to make the disclosures. (*Id.* at 124) (emphasis added) While this conclusion is wrong, it also ignores well-settled precedent that "legally required" disclosure includes the disclosure of "any *material* fact necessary in order to make the statements therein not false or misleading . . . ." *See* SEC Rule 14a-9, 17 C.F.R. § 240.14a-9(a) (emphasis added). *See also, e.g.*, Sections 11, 12, and 17 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l, 77q; Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78n(e); SEC Rules 10b-5, 17 C.F.R. § 240.10b-5 and 14e-3, 17 C.F.R. § 240.14e-3; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). In addition, "legally required" disclosure means more than merely sneaking past SEC review. *See* 15 U.S.C. § 78z ("No action or failure to act by the Commission . . . shall be construed to mean that the particular authority has in any way passed upon the merits of any transaction . . . nor shall such action or failure to act with regard to any report filed with or examined by such authority . . . be deemed a finding by such

authority that such statement or report is true and accurate on its face or that it is not false or misleading."); *see also Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 835 F.2d 1031, 1036 (3d Cir. 1987) (compliance with SEC disclosure requirement did not shield party from liability under Rule 10b-5); *SEC v. Falstaff Brewing Co.*, 1978 WL 1120, at *28 (D.D.C. Oct. 28, 1978) (citing 17 C.F.R. § 240.14a-9(b)), *aff'd*, 629 F.2d 62 (D.C. Cir. 1980). Notably, the Court of Chancery never concluded that any of the purportedly superfluous disclosures was immaterial to Vulcan's shareholders.

Indeed, contrary to the trial court's unsubstantiated conclusion that Martin Marietta "dumped in whatever information . . . would help its case with the Vulcan electorate" (Op. at 123-24), Martin Marietta did not disclose chapter and verse of the parties' past negotiations, any competitively sensitive information, the locations preliminarily discussed with Vulcan relating to the overlap for HSR purposes, and other information that was not deemed material by Martin Marietta after consulting with its outside lawyers. (A160) Rather, Martin Marietta only disclosed material facts relating to past negotiations. For example, the trial court said that Martin Marietta improperly disclosed that "the parties' 'legal teams did not identify any significant impediments to a business combination transaction.'" (Op. at 124) But the law is clear that disclosed information that affects the decision-making calculus of investors is, by definition, material. *See TSC Indus.*, 426 U.S. at 439 ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."). As the trial court found, "[o]ne of the critical determinants of whether a merger would make business sense was whether the divestitures that the Department of Justice might require before approving a Vulcan-Martin Marietta merger would be so substantial that it would make a combination unattractive . . . ." (Op. at 18) And several analysts inquired as to the potential antitrust risk related to the deal. (A1123-25) Thus, as a matter of law, these disclosures were material to shareholders and, therefore, legally required.

The trial court's suggestion that Martin Marietta should have made "barebones" disclosure to, in effect, see what it could get away with (Op. at 122) is not only contrary to the law and decades of public policy favoring disclosure to investors of material facts, but is completely unworkable as a practical matter. Putting to one side the implications of suggesting that counsel appearing before the SEC should attempt to "hide the ball," this interpretation of "legally required" disclosure (a term that appears in literally thousands of agreements) cannot be squared with actual practice, public policy, and basic principles of materiality.

(b) The NDA does not provide that legally required disclosures must be "balanced."

The trial court erred in concluding that the NDA obligated the disclosing party to make only "fair and balanced" disclosures.[9] (Op. at 123, 126-27) Nothing in the NDA provides that legally required disclosures must be "balanced." (A749) And this makes perfect sense. By their nature, *unsolicited* exchange offers and election *contests* (which are permitted under the NDA, as demonstrated above) are exercises in advocacy – and restricting them to "balanced" disclosure is fundamentally inconsistent with that nature. Tellingly, the Court of Chancery failed to cite any provision of the NDA to support this prohibition. Instead, the trial court ignored well-established precedent against judicially importing restrictions on commercial freedom and summarily stated, "[Martin Marietta's] argument finds no contractual support." (Op. at 127) *See Wilmington Trust Co. v. Tropicana Entm't, LLC*, 2008 WL 555914, at *7 (Del. Ch. Feb. 29, 2008) (stating that provisions that restrict commercial freedom "'are traditionally interpreted strictly, precisely because they involve specifically extracted limitations on ordinary economic liberties'") (citation omitted); *Allied Capital*, 910 A.2d at 1024 ("Restrictive covenants in contracts . . . that limit the commercial freedom otherwise available to the parties cannot reasonably be read in [a] squishy and uncertain manner . . . ."); *id.* at 1033 (requiring that restrictions on commercial freedoms be strictly construed). The trial court's holding to the contrary creates uncertainty regarding *how* a party may use permissibly disclosed information and risks causing true restraints on commerce and excessive litigation. Unless a contract expressly limits the use of properly disclosed information to non-advocacy purposes, the law should not impose such a prohibition. *Id.* at 1035.

(c) The law requires disclosure of all material facts, not parsimonious disclosure.

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[9] At most, the trial court identified additional disclosures that should have been made, but this conclusion does not mean that any of the disclosures that were made were not legally required. In addition, some of the disclosures that the trial court identifies as necessary to create a "balanced" S-4 are in direct conflict with the record. For example, the trial court repeatedly criticizes Martin Marietta's failure to disclose "[t]he fact that Nye was willing to embrace a no-premium deal with Vulcan if he became CEO but wanted a 20% premium if he did not . . . ." (Op. at 38, 51, 125) In fact, Martin Marietta wanted Vulcan to pay the Martin Marietta shareholders a premium, but such an offer never materialized. (A803)

In addition, the trial court erred in importing a requirement of "balanced" disclosure into the federal securities laws. (Op. at 124-26) As discussed *supra*, the law requires disclosing all material facts, "not . . . ensuring an exhaustive, dispassionate, and evenly balanced presentation of conflicting interpretations of the facts given." *Abramson v. Nytronics, Inc.*, 312 F. Supp. 519, 524 (S.D.N.Y. 1970).

3. The trial court erred in finding that the repetition of already-known facts was either "disclosure" or a breach.

The trial court went so far as to say that *every* subsequent statement by Martin Marietta's executives repeating information contained in the S-4 to employees, shareholders and other stakeholders constituted "disclosure" of that information and an independent breach of the NDA. (Op. at 127-28) But again, nothing in the NDA prohibits the use of material facts, previously legally required to be disclosed, to promote a business combination. (A749-50) And once a legally required disclosure is properly made, it is public information and cannot be "disclosed" again. Following the wide dissemination of the S-4, including publication on the SEC's internet website, the fact and details of the prior merger discussions were publicly known. "[C]ourts have recognized the SEC website as a 'recognized channel of distribution,' and have charged investors with knowledge of documents posted there." *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 374 (E.D.N.Y. 2003). Thus, there could be no "disclosure" by repeating information contained in the S-4 because that information was already in the public domain. Black's Law Dictionary defines "disclosure" as "[t]he act or process of making known something that was previously unknown." Black's Law Dictionary 531 (9th ed. 2009). Accordingly, "one cannot 'disclose' information that is already publicly known." *Clarke v. Multnomah Cnty.*, 303 Fed. App'x 512 (9th Cir. 2008) (holding that defendant did not make "disclosure" within the meaning of Oregon statute where defendant merely provided information already publicly known).

Similarly, the Court of Chancery wrongly analogized the "disclosures" at issue here with republication in the law of defamation. (Op. at 128 n.273) The rationale for the rule on "republication" is plain: to prevent the spread of lies. *See* DEFAMATION: A LAWYER'S GUIDE § 1:26 (2011) ("American courts have traditionally refused to distinguish between publications and republications of defamatory statements on the theory that 'tale bearers are as bad as tale makers.'") (citation omitted). The repetition of truthful information already in the public domain is not "disclosure" of that information to another, and therefore was not a breach of any prohibition on disclosure contained in the NDA. Concluding otherwise would import a new and completely unexpected term into the NDA.

III. THE TRIAL COURT ERRED IN GOING BEYOND THE PLAIN LANGUAGE OF THE JDA.

The Court of Chancery erred in interpreting provisions of the JDA to convey the precise opposite of their plain meaning.

A. QUESTION PRESENTED

Did the Court of Chancery err in failing to give appropriate deference to the JDA's provision that it shall not limit any rights under the NDA?

B. SCOPE OF REVIEW

The relevant provisions are unambiguous and require *de novo* review. *See* Argument I.B *supra*.

C. MERITS OF ARGUMENT

The trial court misinterpreted the JDA by holding that it strengthened the protections afforded by the NDA (Op. at 89-90), when, as a matter of law and contract interpretation, the JDA cannot affect the parties' rights under the NDA, cannot change the meaning of "Transaction" as defined by the NDA, and cannot limit Martin Marietta's right to use information – even if generated under the JDA – as permitted by the NDA.

The parties entered the JDA to facilitate the antitrust review of a possible transaction, specifically by precluding possible challenges by the Department of Justice of inadvertently waiving privilege when the parties' outside lawyers discussed privileged information with each other. (*See* Op. at 19) But the trial court failed to appreciate that the JDA cannot affect the parties' rights under the NDA, which was designed to apply to the disclosure and use of the information by the parties to the agreement. Paragraph 12 of the JDA makes that Agreement subservient to the NDA by providing that "[n]either the existence of nor any provision contained in this Agreement shall affect or limit any other confidentiality agreements, or rights or obligations created thereunder, between the Parties in connection with the Transaction." (A758; *see also* 326:21-24 (Jacobsen)) This makes perfect sense, as the JDA was negotiated for a different, narrower purpose, and was not intended to supplant any confidentiality agreements that already existed. The trial court suggested that "Paragraph 12 of the JDA does not have the force that Martin Marietta seeks to give it; . . . it does not prevent the JDA, which is a more particular agreement designed to apply to information shared for a particular, defined purpose, from strengthening the protection afforded to nonpublic information shared for that purpose." (Op. at 89-90) But that interpretation directly contradicts the actual language of the JDA by interpreting it in a way that limits the rights of the parties under the NDA.

Second, the trial court erred in concluding that: "neither [the Proxy Contest nor the Exchange Offer]" could be deemed a Transaction under the JDA because neither "was 'the' transaction that was 'being discussed' . . . ." (Op. at 89) The JDA's definition of "Transaction" is not any narrower than the NDA's. The trial record establishes that the parties never (and certainly not at the time that outside antitrust counsel entered into the JDA) "discussed" any parameters of a potential transaction in definitive terms, never shared a term sheet, and never agreed even on such basic matters as price, structure, control premium (if any), board composition, break-up fees, headquarters of the combined company, or management of the combined company. (*See* A21-22; A197-98) The trial court's conclusion could have been correct if based on the language in the JDA before it was changed from "*contemplated*" to "*discussed*" as Vulcan may not at the time have *contemplated* that an unsolicited offer would be made. Because the "potential transaction being discussed" was nothing more than the general concept of combining the two businesses, with every relevant parameter undetermined, the phrase "being discussed" does not limit the potential business combinations that can be considered "Transactions." (*See* A1256; A1254-55)

Finally, the JDA expressly allows the use of information "for purposes of pursuing and completing the Transaction," and "Transaction" is defined as "a potential transaction being discussed by Vulcan and Martin Marietta, or one or more of their divisions, subsidiaries, affiliates, or related companies, involving the combination or acquisition of all or certain of their assets or stock." (A755) Thus, the definition of Transaction under the JDA easily encompasses Martin Marietta's actions in commencing the Exchange Offer (which is expressly conditioned on Vulcan entering into a merger agreement) and soliciting proxies – both actions that ultimately will facilitate a transaction – even a negotiated transaction. The trial court's holding that "neither Martin Marietta's Exchange Offer nor its Proxy Contest fit within the JDA's definition of Transaction" is based on the same flawed reasoning that is used to support its holding with respect to the definition of "transaction" under the NDA. As it did with the NDA, the trial court impermissibly added terms to an unambiguous contract to place artificial limits on a Transaction and further limit the permitted use of confidential information.

IV. THE TRIAL COURT ERRED IN IMPOSING AN INJUNCTION WITHOUT PROOF OF ACTUAL INJURY

The Court of Chancery erred in imposing an injunction without any evidence that it would prevent threatened irreparable harm.

A. QUESTION PRESENTED

Did the Court of Chancery err in granting an injunction without weighing the balance of equities or finding actual injury?

B. SCOPE OF REVIEW

This Court reviews the grant of an injunction "for abuse of discretion, but without deference to the legal conclusions of the trial court." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998) (citation omitted). *See also Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (reversing and remanding decision granting injunction where "the Court of Chancery made a factual finding unsupported by the record" based on "a hypothetical risk" and "applied an incorrect legal standard" in evaluating stock repurchase program).

C. MERITS OF ARGUMENT

The trial court erred in entering an injunction without proof of injury. Relying on the parties' contractual agreement that equitable relief would be an appropriate remedy for any harm resulting from a breach of contract, the trial court cited literally no record evidence of any harm that Vulcan suffered when it addressed the question of remedy. In short, the trial court granted an injunction notwithstanding the lack of any evidence that Vulcan was threatened with harm, much less irreparable harm. It instead relied on a stipulation as to the form of remedy and broadly postulated some harms that might be associated with defending a hostile tender offer. For this reason, and the others explained below, the entry of an injunction, even assuming Martin Marietta's breach, is reversible error.

1. The parties' stipulation to injunctive relief does not satisfy Vulcan's requirement to prove harm.

Instead of relying on evidence of harm, the trial court based its decision on the parties' stipulation that injunctive relief would be appropriate. (Op. at 132-33) The trial court, however, ignored the distinction between a stipulation to *harm* and a stipulation to *relief*. The applicable language in Paragraph 9 of the NDA does not stipulate that any breach of the NDA must necessarily result in *harm*, let alone irreparable harm. It only stipulates to a certain type of *relief*. To earn an injunction, Vulcan still should have been required to prove it would suffer actual harm without one. *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003) ("If the facts plainly do not warrant a

finding of irreparable harm, this Court is not required to ignore those facts, especially since the 'parties cannot confer subject matter jurisdiction upon a court.'") (citation omitted). All of the cases cited by the trial court in support of its reliance on the stipulation demonstrate this contrast. Each of them involved a stipulation to harm, not just remedy.[10] And for that matter, this Court has never held that parties may stipulate *ex ante* either to irreparable harm or the remedy of an injunction.

Moreover, the only remedy that the stipulation could be read to include is a preliminary injunction *before* disclosure of confidential information, not a permanent injunction *after* the information has already entered the public domain. In the former situation – if one of the parties disclosed a discrete set of facts, for example – an injunction could prevent the disclosure of further information and prevent irreparable harm. When the information has already been disclosed, however, a stipulation of injunctive relief is not applicable, and should be ignored by the Court. *See Nutzz.com v. Vertrue Inc.*, 2005 WL 1653974, at *10 (Del. Ch. July 6, 2005) ("Nutzz asserts that its injury is irreparable because the parties' 'contractual agreement as to irreparable injury is dispositive' . . . . That showing is inadequate for several reasons. First, the harm resulting from the alleged misappropriation of Nutzz's trade secrets has already occurred.") (citations omitted). Accordingly, Vulcan's argument that the stipulation gives it an automatic right to permanent injunctive relief fails. Vulcan still should have been required to prove that it would suffer irreparable harm if an injunction does not issue, and that an injunction would remedy or prevent that harm.

Finally, even if the parties had stipulated to irreparable harm and permanent injunctive relief, that stipulation would not be dispositive. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1266 (10th Cir. 2004) (overruling district court's finding that plaintiff had established

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[10] *Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5, featured "an irreparable harm stipulation," as did *Cirrus Holding Co. v. Cirrus Industries, Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001) and *Vitalink Pharmacy Services, Inc. v. Grancare, Inc.*, 1997 WL 458494, at *9 (Del. Ch. Aug. 7, 1997). And in *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006), the parties stipulated to specific performance, but not to harm – and the Court of Chancery was required to find evidence of harm because the parties had not stipulated to that fact. *Id.* In addition, unlike the situation here, *Gildor* "d[id] not involve a balancing of the equities." *Id.* at *9.

irreparable harm and holding that "[a]lthough [the parties] agreed that any breach of the Agreement would constitute irreparable harm and would warrant an award of injunctive relief, that stipulation without more is insufficient to support an irreparable harm finding"); *Salt Lake Tribune Publ'g Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1103-04 (10th Cir. 2003) (finding that plaintiff failed to establish irreparable harm even where parties had stipulated to irreparable harm; applying Delaware law). In this setting especially, where neither the requested relief nor the stipulated remedy fits the alleged harm, the Court should have "form[ed] an appropriate remedy for a *particular wrong*." *Whittington v. Dragon Grp. LLC*, 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011) (emphasis added).

2. Vulcan did not introduce, and the court did not find, any evidence that Vulcan suffered irreparable harm.

Besides improperly relying on the parties' stipulation to a certain form of remedy to show harm, the trial court accepted Vulcan's speculative claims of harm made without any support. (Op. at 134-35) Vulcan never introduced any evidence to support any of the harms relied upon by the trial court, which cited no evidence when finding that Vulcan suffered them. In fact, Vulcan conceded that it has not lost a single customer as a result of them. (A16) Vulcan introduced no evidence that it has lost even one employee as a result of the Exchange Offer. Vulcan offered no evidence that any bidders have been deterred from making an offer for Vulcan.[11] Nor did Vulcan demonstrate any commercial harm – *e.g.*, damage to its competitive position – from the alleged breach of the NDA. (A354)[12]

Furthermore, Martin Marietta did not bargain away its right to make an unsolicited offer. (A22) As a result, Vulcan cannot complain of "harms" that would have resulted from any unsolicited offer, even if the parties had never engaged in negotiations. Instead, Vulcan must establish that it has suffered an injury *caused* by a breach. It failed to do so, and the trial court's finding of irreparable injury should therefore be reversed.

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[11] Vulcan foreclosed discovery on this topic, and the trial court accordingly barred Vulcan from introducing evidence regarding any third-party bidders. (A15) *See also Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000) (refusing to give weight to certain evidence proffered at trial where sponsoring party barred discovery into the issue).

[12] Vulcan withdrew its so-called "expert" who was slated to testify about the supposed harm to Vulcan of receiving the Exchange Offer. (A327)

3. Even if Martin Marietta breached the Agreements, blocking Vulcan's shareholders from electing new directors until the 2013 Annual Meeting is not the proper remedy.

As a threshold matter, the effect of the injunction prohibiting Martin Marietta's use and disclosure of confidential materials is not limited to four months. Effectively, the Court of Chancery enjoined Martin Marietta from launching a proxy contest until next year's annual meeting. The Opinion recognizes as much: "Such an injunction would preclude Martin Marietta from running its slate of directors for election at Vulcan's June 1, 2012 annual meeting." (Op. at 136) By the trial court's own reasoning, then, its remedy effectively imposes a year's delay.

The trial court's remark that the JDA has no expiration date is of no import because, as explained above, the JDA cannot be interpreted in such a way as to affect the parties' rights under the NDA, which allows either party to use information after its two-year period expires. (A45) Moreover, to hold Martin Marietta to the terms of the JDA past the expiration of the NDA would simply make no sense. The former agreement, meant to facilitate antitrust review and protect attorney-client communications, has no application beyond the term of the broader agreement setting forth the terms of any transaction.

4. Delaware public policy supports holding the parties to the agreement they signed, not the one Vulcan wished it signed.

In addition to lacking any legal basis, the trial court's injunction misapplies long-standing Delaware public policy. Martin Marietta does not contest the importance of contractual rights. Indeed, enforcing the bargain the parties actually reached is exactly what the trial court should have done.

But the Court of Chancery did not do that. Instead, the trial court denied Martin Marietta the commercial freedom to which the parties had agreed, not because of the terms of the Agreements, but based on the trial court's view of extrinsic evidence and its own policy preferences. The parties agreed not to disclose or use the shared information for purposes other than a business combination. They could have further limited the form or circumstances of the business combination, but did not. By having a court after-the-fact create terms not in the agreement, the decision signals to parties that they should not enter into a confidentiality agreement, even without a standstill provision, if they want to leave open the possibility of making an unsolicited bid later.

The surest way to chill wealth-creating contracts is to find ambiguity where there is none. It would have been easy, natural and within the standard practice to have drafted the NDA as the trial court now construes it – but the parties did not. The injunction therefore does not advance Delaware's interest in enforcing contracts and giving confidence and certainty to contracting parties. It rather promotes sloppy draftsmanship and a potentially dangerous game of "gotcha," where parties could face obligations they never signed up for if they aren't exceedingly careful, even when they follow industry conventions. Requiring parties to clearly spell out the obligations they intend to place on each other, on the other hand, encourages parties to avoid exactly the sort of situation that precipitated this litigation.

In short, imposing restrictions that do not appear in unambiguous terms is bad policy. Rewriting contracts of sophisticated parties has never been the policy of the Delaware courts. But in one fell swoop, the trial court would reverse the normal presumption that, in the absence of clear contractual provisions limiting conduct, parties to contracts should be able to conduct their legitimate commercial affairs freely. *Allied Capital*, 910 A.2d at 1033.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court reverse the Final Order and Judgment of the Court of Chancery, dissolve that court's injunction, and rule that as a matter of law, Martin Marietta could not have breached the NDA or the JDA.

Respectfully,

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